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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 421

KOKOMO PAPER HANDLERS' UNION No. 34 and KOKOMO PRINTING PRESSMEN & ASSISTANTS' UNION No. 302, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AFL-CIO,

PETITIONERS,

v.

CUNEO PRESS, INC.,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on July 2, 1956.

OPINIONS BELOW

The District Court did not issue an opinion. Its Order Overruling the Motion to Stay Proceedings filed by Petitioners is set forth at page 15 of the record. The Opinion of the Court of Appeals,

which is reprinted as Appendix B hereto (pp. ..18-24...), is reported in ..... F. 2d .....

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1956. On July 13, 1956, Petitioners filed their Petition for Rehearing, which was denied by the Court of Appeals on July 28, 1956. On July 30, 1956, Petitioners filed a Motion for Leave to Submit Additional Authorities, which Motion was denied by the Court of Appeals on August 9, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTION PRESENTED

Did Section 3 of the United States Arbitration Act, 9 U.S.C.A. Sec. 1, authorize and the terms of the collective bargaining contract between Petitioners and Respondent warrant a stay of the damage suit instituted against Petitioners by Respondent pending arbitration of the issues involved therein?

STATUTES INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A. Sec. 185; 61 Stat. 156, provides, insofar as relevant, as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting

commerce as defined in this Act, or between any such labor organizations may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The applicable provisions of the United States Arbitration Act, 9 U.S.C.A. Secs. 1-14; 61 Stat. 669; provide as follows:

"Sec. 1. 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce', as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

"Sec. 3. If any suit or proceeding be brought

in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

STATEMENT

Petitioners, Kokomo Paper Handlers' Union No. 34 and Kokomo Printing Pressmen & Assistants' Union No. 302, are local labor organizations representing the employees of the Respondent, Cuneo Press, Inc., a corporation owning and operating a printing plant in Kokomo, Indiana. Such Respondent is engaged in interstate commerce, and is, accordingly, subject to the Labor Management Relations Act, 1947 (R. 3).

In April, 1953, the parties entered into a collective bargaining agreement covering such substantive terms and conditions of employment as wages, hours, holidays and vacations. In addition it established a comprehensive grievance procedure, the text of which is reproduced as Appendix A to this Petition (R. 11). Such agreement provided in extensive terms that "should any question or difference arise between the parties to this agree-

ment, such questions or differences shall be immediately be referred in writing to . . . the Joint Standing Committee." The agreement provides further that if a "question or difference" has been referred to the Joint Standing Committee, and should such committee "fail to agree within thirty days" then "the matter in dispute, on demand of either party, shall be referred to arbitration." The jurisdiction of such Joint Standing Committee is defined by contract to include, among other things, issues involving "any alleged violations" of agreement.

Respondent's Complaint was filed in the United States District Court for the Southern District of Indiana on January 4, 1955, under color of Sec. 301(a) Labor Management Relations Act, 1947, alleging that contrary to the terms of the collective bargaining agreement between the parties, Petitioners had caused a work-stoppage to occur in Respondent's Kokomo, Indiana plant, with respect to which Respondent sought damages and injunctive relief (R. 3).

On February 15, 1955, Petitioners filed their Motion to Stay Proceedings, pursuant to the United States Arbitration Act, 9 U.S.C.A. Sec. 3, averring that the issues presented by Respondent's damage suit were properly referable to arbitration under the collective bargaining contract. Thereafter, the District Court on September 12, 1955, overruled such Motion to Stay Proceedings without opinion (R. 15).

On appeal, the Court of Appeals affirmed the District Court, apparently on the theory that when

the Petitioners by-passed the grievance procedure for the purpose of engaging in a strike they thereby waived their right to arbitrate the resulting issues of contract breach and damages raised by the suit. The Court of Appeals assumed the applicability of the Federal Arbitration Act to collective bargaining agreements, but held as a matter of law that when Petitioners chose to use economic force in alleged violation of their contract, they could not thereafter avail themselves of its arbitration provisions, despite the fact that Respondent did not exercise any right it might have had to terminate such agreement on the theory that Petitioners were guilty of a material breach thereof.

REASONS FOR GRANTING THE WRIT

1. There is a square conflict between the decision of the Seventh Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Signal-Stat Corp.* v. *Local* 475, *United Electrical, Radio & Machine Workers of America* (*U.E.*), decided July 2, 1956, —— F. 2d ——, which opinion is reprinted as Appendix "C" to this brief. In the *Signal-Stat Corp.* case, *supra*, as here, a strike had been called in alleged violation of a collective bargaining agreement. As here, the Union there filed its Motion to Stay pending arbitration. The Second Circuit reversed a District Court order denying a stay of proceedings, holding that an arbitration clause in the collective bargaining agreement there involved, providing that "all disputes, grievances or differences" between the parties were arbitrable, contemplated a dispute relating to an alleged breach of the no-strike clause in such

contract. In so determining, the Court also held that Section 3 of the Federal Arbitration Act authorized the stay. It is fair to equate the scope of the arbitration clause encountered in the *Signal-Stat* case with the arbitration provision in the case at bar, which requires the submission to arbitration of "any questions or differences", including specifically "alleged violations" of agreement. Moreover, the so-called no strike clause in the contract at bar; *i.e.*, Article XIV (R. 6), provides that "in case of an unauthorized stoppage, the Union and the Employer will cooperate to fix responsibility and take appropriate action, disciplinary or otherwise, to remove the cause or causes." Such language demonstrates that the parties envisaged the settlement of the contract breach issues within the framework of the collective bargaining instrument. This conclusion finds further support in Article XX, Section 7, in which the parties "agreed that the procedures herein provided for settling disputes by arbitration shall be used to the exclusion of any other means available to the parties." It is manifest that by this language the parties intended to substitute the arbitral process for litigation as a means of disputes settlement. It is also clear from the foregoing provisions that under that process the arbitrator would have authority, if the determination were in the employer's favor, to award appropriate compensatory damages and the union does not contend to the contrary. We suggest that the clear-cut diversity of view between the Seventh and Second Circuits should be resolved in favor of the Second Circuit. For there is no decisional support whatsoever for

the view of the Seventh Circuit (and that Court cited none), that although an agreement is broad enough to require the arbitration of a contract breach issue, the Courts will refuse the stay of proceedings authorized by Section 3 of the Arbitration Act on the theory that in striking the Unions "ignored the grievance procedure as well as the provision for arbitration." This rationale completely overlooks the plain fact that the strike is the very cause for the arbitration which Petitioners here sought under contract language clearly comprehensive enough to require the submission to arbitration thereunder of the contract breach and damage issues with which Respondent's suit is concerned. As put in *Markel Electric Product* v. *United Electrical R. & M. Workers*, 202 F. 2d 435, 438, "*If there is a binding agreement to arbitrate the resort to a strike here, the existence of the very cause for arbitration cannot constitute a breach ending defendants' right to arbitrate.*"

Consistent with the Second Circuit holding is the District Court determination in *Lewittes & Son* v. *United Furniture Workers*, 95 F. Supp. 851, where under contract language requiring arbitration in terms similar to those involved here [1] a stay was granted pending arbitration of an action instituted for damages predicated upon a strike in alleged violation of a collective bargaining agreement.

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[1] The contract in *Lewittes* required arbitration of "all grievances, complaints, differences or disputes" and may be compared in breadth with the unrestricted arbitration language in the contract at bar of "any questions or differences."

In accord are the following determinations by the State Courts of New York, In re *Potoker,* 146 N.Y.S. 2d 616; 25 LA 577; *Application of Stewart Stamping Corp.,* 285 App. Div. 953; 138 N.Y.S. 2d 327.

2. The issue upon which a conflict exists between the Seventh and Second Circuits is one of utmost importance in labor relations today. Agreements to arbitrate disputes with respect to violations of the terms of collective bargaining agreements are found in a majority of contracts. It is in keeping with the National labor policy to encourage the fullest possible utilization of the arbitral process in the solution of collective bargaining disagreements and to keep labor-management controversies out of the courts. The Seventh Circuit's decision gives effect to a now antiquated judicial aversion to the enforcement of arbitration agreements in the face of the specific agreement of the parties to arbitrate alleged contract violation. Cf. *U. E.* v. *General Electric,* 233 F. 2d 85. Thus the decision of the Court of Appeals in this case is in the teeth of both considerations of desirability which attach to arbitration agreements under modern and enlightened concepts of labor relations, as well as the very language of the contract itself. The decision below is unsound in terms of law, principle and policy. As we have shown, it is at variance with the Second Circuit's decision in *Signal-Stat Corp., supra.* Such conflict in view between two Circuit Courts of Appeal should alone warrant review by this Court. But of corollary importance is the prejudice resulting to Petitioners under a clearly erroneous decision.

For indeed the Court of Appeals holding undertakes to ground the denial of the stay sought by Petitioners on the theory that Petitioners were "in default in proceeding with arbitration" because of the strike, when in fact the issues Petitioners seek to arbitrate *did not arise until after the strike.* This holding also overlooked Petitioners' Motion to Stay, which averred that they were not in default in proceeding with arbitration, and the rule of decision that on a motion to stay the Court must take the moving party's "version of the issue." *Shanferoke Coal & Supply Corp. of Del.* v. *Westchester Service Corp.*, 70 F. 2d 297, affirmed 293 U.S. 449.

The foregoing considerations persuade that this is an appropriate case for an exercise by this Court of its review power.

3. While the Court below did not pass upon the applicability of the United States Arbitration Act to collective bargaining agreements, we recognize the necessity of an affirmative declaration upon this point if the Petitioners' Motion to Stay Proceedings is to be granted. There is a widespread divergence of view among the Circuit Courts of Appeal upon this issue. The First[2] and Sixth[3] Circuits hold that the Federal Arbitration Act is applicable to collective bargaining agreements, on the theory that the exclusionary clause in Section 1 of such Act, which purports to remove from its operation *"contracts of employment of seamen, railroad employees or any other class of workers*

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[2] *United Electrical Workers of America* v. *General Electric*, 233 F. 2d 85;

[3] *Hoover Motor Express Co.* v. *Teamsters, Chauffeurs, et al*, 217 F. 2d 49.

engaged in foreign or interstate commerce" does not contemplate collective bargaining agreements, since such agreements are "trade agreements" rather than "contracts of employment." The Second [4] and Third [5] Circuits reach the same result with respect to the printing employees with which we are here concerned on the theory that the exclusion set out in Section 1 applies only to workers who are themselves directly engaged in interstate or foreign commerce in the manner of seamen or other transportation workers. On the other hand, the Fourth [6] and Fifth [7] Circuits hold that the exclusionary clause bars the application of the Arbitration Act to collective bargaining agreements. This issue is one of prime importance in the field of labor relations law and presents a question which has not been but should be decided by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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[4] *The Signal-Stat Corp.* case, *supra;*

[5] *Tenney Engineering Co.* v. *United Electrical Workers*, 207 F. 2d 459;

[6] *Int'l Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33;

[7] *Lincoln Mills of Ala.* v. *Textile Workers Union of America*, 230 F. 2d 81.

APPENDIX "A"

"ARTICLE XVIII.

JOINT STANDING COMMITTEE.

Section (1) Should any questions or differences arise between the parties to this Agreement, said questions or differences shall immediately be referred to in writing to the Joint Standing Committee.

Section (2) A Joint Standing Committee shall be maintained, to consist of two (2) representatives of the Employer, and two (2) representatives of the Union, and in the case of a vacancy, prolonged absence, or refusal of a representative to act, another shall be immediately appointed in his place. To this committee shall be referred all questions which may arise as to the construction to be placed upon any of the clauses of this Agreement, or any alleged violations thereof, which cannot be settled otherwise. Such Joint Standing Committee shall meet within fifteen (15) days after any questions or differences shall have been referred to it for decision by the authorized representatives of either party to this Agreement.

Section (3) If, after a question of difference has been referred to the Joint Standing Committee, the representatives of one party on said Committee shall fail or refuse to meet the representatives of the other party on said Committee, the subject in controversy shall, at the end of fifteen (15) days from the date on which the question or difference was referred to the Joint Standing Committee, be referred to an Arbitration Board upon the demand of either party to this Agreement.

Section (4) Should the Joint Standing Committee fail to agree within thirty (30) days from the date on which a question or difference shall have been referred to it by either party to this Agreement, as set forth in Section (1) of this Article, the following procedure shall be followed:

Item (1) The matter in dispute, on demand of either party shall be referred to arbitration.

Item (2) Within ten (10) days of such demand the party raising the question or difference shall make a complete statement of its case and furnish a copy thereof to the other party.

Item (3) The other party shall prepare its answer within ten (10) days and furnish a copy thereof to the party raising the question or difference.

Article XIX.

Grievance Procedure.

Section (1) Any aggrieved employee or employees in the bargaining unit must first present his or their grievance through his Chapel Chairman to the Foreman. When presented through the Chapel Chairman, the alleged grievance must be reduced to writing within seventy-two (72) hours on a designated form and signed by the aggrieved employee or employees. The Foreman shall attempt to adjust the grievance and shall render a decision in writing within three (3) working days, then it shall be referred to the Joint Standing Committee and procedure as outlined in this Agreement shall be initiated.

Section (2) If the decision of the Foreman does not settle the grievance to the satisfaction of the employee or the Union, the matter then, within three working days from the time the decision is rendered, shall be referred to the officers of the Union. If the matter cannot be settled to the satisfaction of the officers of the Union within three working days, then it shall be referred to the Joint Standing Committee and procedures as outlined in this Agreement shall be initiated.

Article XX.

Arbitration Agreement.

Section (1) A Board of Arbitration shall be formed as follows: Within thirty (30) days after a question or difference between the parties to this Agreement shall have come to the point where it is ready for

consideration by the Board of Arbitration, each party to the controversy shall appoint two (2) representatives to serve on the Board. When the four (4) representatives of the parties to the controversy shall have been selected, they shall, within the next thirty (30) days aforementioned, choose an additional member, who shall be a disinterested party and who shall act as Chairman of the Board.

Section (2) A majority of the Board shall govern in all cases.

Section (3) After the Board of Arbitration shall have been organized it shall proceed forthwith to conduct the hearing under the following rules:

(a) The Chairman shall preside, put motions, etc., and shall be entitled to vote on all propositions. He shall approve and sign all of the reports of the proceedings of the Board.

(b) The Board may demand duplicate, typewritten statements concerning the questions or differences.

(c) It may examine all parties involved in any difference referred to it for adjudication.

(d) It shall employ such stenographers, etc. as may be necessary to facilitate business, and to provide a record for its use. Said record to be properly paged and indexed.

(e) It may require affidavits on all disputed points.

(f) Equal opportunity shall be allowed for presentation of evidence and argument.

(g) In the event of either party to the dispute refusing to appear or present its case, after due notice, it may be adjudged in default and decision shall then be returned against such party.

(h) All evidence communicated to the Board in confidence shall be preserved inviolate, and no record of such evidence shall be kept.

(i) The party making the original demand shall have the right to present its case and evi-

dence without interruption, excepting that when oral evidence is introduced, a cross-examination of witnesses shall be allowed. The opposing party shall have the same right to present evidence strictly in rebuttal, and opposing party shall be allowed to present counter-evidence strictly in sur-rebuttal. When objection is made by either party to the admission of evidence offered by the other party, the Board by vote shall decide as to the admissibility of the evidence in question.

(j) In case of the inability of either side to present evidence at the moment, the order may be varied to the extent of allowing such evidence to be presented at such sessions as may be agreed upon by the Board. No evidence shall be received or considered that was not presented at a regular open session of the Board, except that it shall be allowable for the members of the Board in any case to visit any office to see the operation of labor therein, or for any other purpose necessary to aid in arriving at a just decision.

(k) After all evidence has been presented oral arguments may be limited to one speech on each side. Written pleadings instead of oral arguments shall be allowable and may be ordered by the Board.

(l) There shall be an agreement by at least a majority of the members of the Board as to the exact time and place of hearing, of which both parties shall be notified in session. The session shall be continuous, except for necessary interruptions, until the hearing is concluded.

Section (4) Each party to the proceedings before the Board shall pay its individual expense incurred in the presentation of its own case. Each party shall pay one-half (½) of the fee of the Chairman and the expense of the employment of the stenographer in making a record of the case.

Section (5) When the hearings are concluded the Board shall without unnecessary delay go into execu-

tive session, from which all persons except the members of the Board shall be excluded, for the determination of its award. In its deliberation, the transcript of the stenographic report shall be accepted as the best evidence of what occurred at the hearing, unless it can be shown that gross errors exist in said transcript. The award of the Board must be formulated and signed by all the members thereof at a regular executive session after there has been full opportunity for consideration and discussion, the date and time for such session having previously been determined at a full meeting of the Board. The findings of the Board, or a majority thereof, shall be final and shall be accepted as such by the parties to the question or difference under consideration. All members of the Board shall sign its award, but if any member of the Board dissents from the award, and wishes to file a dissenting opinion he shall give immediate notice to that effect, and shall within forty-eight (48) hours after the award has been decided upon, and before it has been promulgated, formulate his reasons for dissenting, and such opinion must be signed by him before the final adjournment at a regular executive session arranged for as above provided. Such dissenting opinion, when thus signed, must be attached to the award.

Section (6) The Board shall not be compelled to set forth its reasons for making the award, and may do so only in the written award. In framing its award the findings shall be expressed in detail, to the end that no misunderstanding shall afterward occur.

Section (7) It is further agreed that both the language and the spirit of the Agreement guarantee the prompt and faithful performance by the Union of all service demanded by the Employer at the time required according to the provisions of this Agreement, it being recognized that it is imperatively obligatory upon both parties whenever any difference of opinion as to the rights of either party under the Agreement shall arise or whenever any dispute as to the construction of the Agreement, or any of its provisions take place, at once to appeal to the duly constituted authorities under this Agreement viz: the Joint Stand-

ing Committee, and in case of disagreement, to the Board of Arbitration, to the end that fruitless controversies shall be avoided, good feelings and harmonious relations be maintained, and the prosecution of the business in which the parties have a community interest be assured without strike, lockout, slow down or interruption of any kind.

It is agreed that the procedures herein provided for settling disputes by arbitration shall be used to the exclusion of any other means available to the parties who execute this Agreement, it being understood that all arbitration decisions rendered under the terms of this contract are final and binding on both parties. Any rights or remedies otherwise available to the parties to this contract are hereby expressly waived."

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11611

APRIL SESSION, 1956, OCTOBER TERM, 1955

CUNEO PRESS, INC., *Plaintiff-Appellee,*

v.

KOKOMO PAPER HANDLERS' UNION NO. 34, and KOKOMO PRINTING PRESSMEN & ASSISTANTS' UNION NO. 302, INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, A. F. L., *Defendants-Appellants,*

and

INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, A. F. L., *Defendant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

July 2, 1956

Before DUFFY, *Chief Judge*, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* The defendant unions Nos. 34 and 302, above named,[1] have appealed from an order of the district court overruling their motion to stay proceedings in a suit theretofore filed in that court by Cuneo Press, Inc., in which said defendants and the international union above named were sued.

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[1] Sometimes referred to as "the unions."

The following facts appear from the verified complaint filed in said suit by plaintiff:

Said action was brought pursuant to § 301 of the National Labor Management Relations Act of 1947.[2] Plaintiff, engaged in the printing business in Kokomo, Indiana, and the unions on April 10, 1953, entered into a contract providing for its employees' wages, hours and working conditions. Article XIV of said contract provides:

> "Article XIV. Work Stoppage.
>
> Section (1) It is understood that the Union is without power to compel its members to work with non-union employees, and any such refusal to work shall not constitute a breach of this Agreement. *The parties to this contract shall undertake to avoid any lockout, strike, slow down or stoppage of work during the life of this Agreement.* In case of an unauthorized stoppage, the Union and the Employer will cooperate to fix responsibility and take appropriate action, disciplinary or otherwise, to remove the cause or causes." (Emphasis supplied.)

From January 24, 1955 to January 27, 1955, when said complaint was filed, the unions engaged in, induced, encouraged and caused the employees of plaintiff to engage in a strike or work stoppage. The officers, agents and employees of local No. 34 induced plaintiff's employees who are members of said union to cease working at the plant and to refuse to report for work "since January 24, 1955". The officers, agents and employees of local No. 302, engaged in, induced and encouraged all of plaintiff's employees who are members of said union to present themselves on the property and in the plant of plaintiff, but all of said employees refused to perform any work and participated in what is commonly termed a sit down strike. The unions caused said work stoppage of the entire operation of plaintiff's plant, because of their dispute with another union over certain work in that plant, amounting to

[2] 29 U. S. C. A. (1955 Supp.), §§ 141, 185; 61 Stat. 136, 156.

not more than 1/10th of 1 per cent of the entire operations of the plant, and said work stoppage "was and is without just cause". Said unions are subsidiaries of the international union. The plant is primarily engaged in the publication of magazines and other periodicals which have a wide-spread national and international circulation. Said work stoppages "have rendered plaintiff" unable to carry out its contracts with publishers, to its irreparable damage. Defendants should be enjoined from further violating said contract, particularly article XIV thereof. Said contract provides for arbitration in the event of a dispute, but, notwithstanding such contract provision, the defendants "have refrained and refused" to arbitrate alleged grievances.

Plaintiff asks damages, a temporary restraining order and an injunction from further violation of said contract.

Upon the filing of the suit in the district court, the work stoppage ended. In oral argument here, it was stated and not denied that the stoppage lasted three days. There are entries in the district court's docket, incorporated in the record before us, which corroborate this statement.

On February 15, 1955, the unions moved "pursuant to the Arbitration Act, Title 9 U. S. C. A., Sec. 3"[3] "to stay the proceedings brought against them," in which motion they set forth: "since the issues involved are properly referable to arbitration under the contract between the plaintiff and these defendants, which said contract is referred to in paragraph II of the complaint, and these defendants being not in default in proceeding with such arbitration." In opposition to that motion plaintiff filed the affidavit of Frank H.

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[3] "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

Ingram, its vice-president, in which he averred, *inter alia*, that:

> "• • • on January 24, 1955, the defendant Unions as charged in plaintiff's complaint, did engage in what is commonly termed a 'sit-down strike'; that such strike was called and conducted by said Unions in direct violation of the contract which was in full force and effect by and between such Unions and the plaintiff herein; that the Unions at no time made any attempt whatsoever to submit any agreement or complaint to arbitration, but on the contrary, proceeded to call such strike without warning or notice to the plaintiff; that if there were any grievances, which were submitted to arbitration in accordance with such contract of employment, the defendants were wholly in default in calling such strike without attempting to arbitrate any alleged complaint or grievance."

The district court, on September 12, 1955, denied the motion and this appeal followed.

1. Plaintiff asks us to dismiss the appeal because, so it says, the appeal is taken from an order which is not final or appealable.

We hold that the motion for a stay in this case was an application for an interlocutory injunction based upon the motion setting up the special defense of a duty to arbitrate. *Shanferoke Co.* v. *Westchester Co.*, 293 U. S. 449, at 452. See also *Enelow* v. *N. Y. Life Ins. Co.*, 293 U. S. 379. Title 28 U. S. C. A., § 1292 provides that courts of appeals shall have jurisdiction on appeals from:

> "(1) Interlocutory orders of the district courts of the United States, • • • refusing • • • injunctions, • • • except where a direct review may be had in the Supreme Court; • • •."

Hence the order in question is interlocutory and appealable.

Plaintiff relies on *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176. There the court, at 184, dis-

tinguished that case from the *Shanferoke* case, which we believe is controlling here.

2. The local unions rely on § 3 of the Federal Arbitration act, Title 9 U. S. C. A., § 3, *supra*, note (3). For the purpose of our disposition of this case, we shall assume, without deciding, that said act is applicable to this case.[4]

It is obvious that the unions were not entitled to a stay unless it appeared that they were "not in default in proceeding with such arbitration". That is a part of § 3 and was recognized as essential by the unions when they stated in their motion for a stay, "these defendants being not in default in proceeding with such arbitration". According to the record, they offered in the district court no factual showing that they were not in default. On the other hand, plaintiff showed by its verified complaint and by the affidavit of Ingram that the unions engaged in, induced, encouraged and caused the strike or work stoppage, in direct violation of their contract with plaintiff. It further appears from said affidavit that the unions at no time made any attempt to submit any agreement or complaint to abritration, but on the contrary proceeded to call such strike without warning or notice to plaintiff, and that they were wholly in default in calling such strike without attempting to arbitrate.

The collective bargaining contract in question provided first for "Grievance Procedure", which is a method of settling an employee grievance. In the event that such grievance could not be handled by the foreman or a joint standing committee, arbitration procedure was established:

> "• • • to the end that fruitless controversies shall be avoided, good feelings and harmonious relations be maintained, and the prosecution of the

[4] Counsel agree that there is a contrarity of opinion among the courts on this subject. Cf. *Hoover Motor Express* v. *Teamsters, Chauffeurs, etc.*, 217 F. 2d 49; *United States Steel Corporation* v. *Nichols*, 229 F. 2d 396; *United Electrical, R. & M. Wkrs.* v. *Miller Metal Prod.*, 215 F. 2d 221; *Amalgamated Ass'n, etc.* v. *Pennsylvania Greyhound Lines*, 192 F. 2d 310, and *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33.

business in which the parties have a community interest be assured without strike, lockout, slow down or interruption of any kind.

It is agreed that the procedures herein provided for settling disputes by arbitration shall be used to the exclusion of any other means available to the parties who execute this Agreement, it being understood that all arbitration decisions rendered under the terms of this contract are final and binding on both parties. Any rights or remedies otherwise available to the parties to this contract are hereby expressly waived."

If the unions had grievances, it is apparent that they ignored the grievance procedure, as well as the provision for arbitration. Instead they instituted a sit down strike which was disruptive of plaintiff's business and the work of its employees. That action was in direct conflict with the arbitration procedure called for by the contract. Indeed, the unions in their brief herein quote the following language from *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851, at 856:

> "Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. • • • The Courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.'"

The unions chose to act suddenly and without warning in using the economic force or pressure of a sit down strike. Obviously, a chief purpose of the arbitration agreement was to avoid a strike. When the unions embarked upon the strike they voluntarily by-passed arbitration. When they struck the wrong was done and the damage to plaintiff began. Then it was that plaintiff's right of action for damages and injunctive relief to prevent further damage accrued.

3. Faced with plaintiff's suit for injunction and damages, the unions sought a stay order pursuant to

§ 3 of the Arbitration act.[5] However, their position at that time was untenable. First, there was then no longer any issue referable to arbitration under the agreement in reference to arbitration. Even if the unions originally had an issue referable to arbitration, they chose instead to resolve that issue in their favor by use of their economic strength. Having thus violated their contract to plaintiff's damage, it was too late for them to demand arbitration on that issue. Secondly, before the court could be justified in granting the stay order, it was necessary that the unions show that they were not in default with proceeding with such arbitration. While in their motion they quote the language from the proviso of § 3, in the form of a general conclusion that they were not in default, this was not a sufficient showing. Against their unverified motion in that form, the complaint, under oath, and Ingram's affidavit set forth facts (in no way denied), which clearly show that the unions were seriously in default in embarking upon a strike rather than seasonably seeking arbitration.

For the reason hereinbefore set forth, we hold that the district court did not err in entering the order from which the unions have appealed, and therefore that order is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

[5] 9 U. S. C. A., § 3.

APPENDIX "C"

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT, NEW YORK

SIGNAL-STAT CORPORATION *v.* LOCAL 475, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), No. 341, July 2, 1956.

CONTRACTS

—Breach of contract—Damage action against union —Jurisdiction ►24.901 ►80.551

Federal district court has jurisdiction of action by employer under Section 301(a) of Labor-Management Relations Act to recover damages for union's alleged breach of no-strike clause in collective bargaining contract. Action does not involve "uniquely personal right of employee" such as was held outside scope of Section 301(a) in *Westinghouse Salaried Employees* v. *Westinghouse Corp.* (35 LRRM 2643). (CA 2)—*Signal-Stat Corp.* v. *Local 475, UE*, 26 LA 736.

—Breach of contract—Damage action against union —Appeal ►24.901 ►94.80

Order of lower court denying stay, pending arbitration, of action by employer under Section 301(a) of Labor-Management Relations Act to recover damages for union's alleged breach of contract is appealable. It is immaterial that action is at law for damages to enforce statutory, rather than common law right. (CA 2)—*Signal Stat Corp.* v. *Local 475, UE*, 26 LA 736.

ARBITRATION

—Arbitrability of dispute—Breach of no-strike clause ►94.163

Arbitration clause in collective bargaining contract providing that "all disputes, grievances, or differences" between the parties are arbitrable covers a dispute relating to an alleged breach of a no-strike clause in contract. (CA 2)—*Signal-Stat Corp.* v. *Local 475, UE*, 26 LA 736.

—Federal Arbitration Act—Applicability—Collective bargaining contract—Stay of court action pending arbitration ►94.07.

Section 3 of Federal Arbitration Act, authorizing stay of court proceeding pending arbitration pursuant to certain agreements, is applicable to collective bargaining contract providing for arbitration of disputes between parties, since contract is a "contract evidencing a transaction involving commerce" within meaning of Section 2 of Act and is not a contract "of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" within meaning of exclusionary clause of Section 1 of Act. In view of almost universal approval of arbitration as means for settling labor disputes, courts should interpret action so as to further, rather than impede, arbitration in this area, and employees covered by this contract are not actually engaged in commerce but merely in manufacture of goods for commerce. (CA 2)—*Signal-Stat Corp.* v. *Local 475, UE*, 26 LA 736.

Appeal from an order of the U. S. District Court for the Eastern District of New York (26 LA 56). *Reversed.*

Herbert Burstein, Zelby & Burstein, of New York, N. Y., for plaintiff.

Mildrel Roth, for defendant.

Before CLARK, *Chief Judge,* and FRANK and HINCKS, *Circuit Judges.*

FULL TEXT OF OPINION

The plaintiff, Signal-Stat Corp., is a corporation engaged in the manufacture of automotive electrical equipment. A dispute arose between the plaintiff and the defendant, Local 475, concerning the discharge of two employees. The plaintiff's employees went on strike until it was eventually agreed that all employees, except the two discharged by the company, would return to work and the dispute over the discharged employees would be settled by arbitration. The plaintiff then instituted this action against the defendant union for damages under Section 301 of the Labor Management Relations Act of 1947 (29

U.S.C. Section 185), alleging that the union had called, ordered and enforced a strike and sitdown of production employees. This was alleged to be a violation of the no-strike clause in the collective bargaining agreement between Signal-Stat and the Union. There was no diversity of citizenship.

[CONTRACT TERMS]

Without answering the complaint, the defendant Union moved for a stay of the action, claiming that, under the collective bargaining agreement, it was entitled to arbitration of the dispute. The pertinent parts of the agreement are as follows:

"17. Strikes and Lockouts.

"During the term of this agreement there shall be no strikes, stoppages or lockouts for any cause or reason whatsoever, but work shall proceed and continue without interruption pending settlement through the grievance procedure and/or arbitration as hereinafter provided.

"18. Grievance Procedure

"All disputes, grievances or differences that may arise between the parties of this agreement shall promptly be filed in writing with the Employer or the Union as the case may be, and shall promptly be taken up for adjustment between the aggrieved employee and the Shop Committee on the one hand, and the Employer on the other. In the event that they are unable to agree, the matter shall then be taken up between a representative of the Union, the Shop Committee and the Employer for adjustment. If no satisfactory settlement is arrived at, within ten (10) days from the date of the filing said grievance, then the difference, dispute or grievance shall at the request of either party, be immediately submitted for arbitration. Failure to submit such issue within said ten (10) days shall be construed as a final determination of said grievance. The arbitrator shall be appointed by the New York State Board of Mediation at the request of either party, and the parties hereto agree to be bound by the award rendered by said arbitrator."

[HOLDING BELOW]

The district judge entered an order denying the motion for a stay. The Union appeals, asserting that it is entitled to a stay under Section 3 of the United States Arbitration Act (9 U.S.C. Section 3),[1] or under Section 301(a) of the Taft-Hartley Act.[2]

FRANK, *Circuit Judge:*

1. An initial question is whether the district court has jurisdiction over the plaintiff's action for damages under Section 301(a) of the Taft-Hartley Act. This is not the type of action involving the "uniquely personal right of an employee," which, according to *Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U. S. 437, 35 LRRM 2643, was not intended

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[1] The U. S. Arbitration Act reads, in part:

Section 1. "* * * 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

Section 2. "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole of any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3. "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

[2] "Section 301(a). Suits for violation of contracts between an employer and a labor orginization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U. S. C. Section 185(a).)

by Congress to be brought under Section 301. The Court in *Westinghouse* did not, therefore, reach or decide the constitutional-jurisdictional question raised by Section 301. Hence, we adhere to our decision in *Shirley-Herman Co.* v. *International Hod Carriers*, 182 F. 2d 806, 26 LRRM 2258 (C.A. 2), where we held that Section 301 created a federal substantive right and federal jurisdiction to enforce it. See also, *Rock Drilling, Blasting, Etc.* v. *Mason & Hanger Co.*, 217 F. 2d 687, 691, 35 LRRM 2232 (C.A. 2). Other courts, since *Westinghouse*, have reached a similar result. See *Lincoln Mills of Alabama* v. *Textile Workers Union*, 230 F. 2d 81, 87-88, 25 LA 810 (C.A. 5); *United Electric, R. & M. Workers* v. *General Electric*, 38 LRRM 2019, 2030 (C.A. 1).

2. The order of the district court is appealable. *Shanferoke Corp.* v. *Westchester Corp.*, 293 U. S. 449. The fact that, here, the action "at law" for damages is to enforce a statutory rather than a common law right is immaterial. *Wilko* v. *Swan*, 201 F. 2d 439, 441 (C.A. 2), reversed on other grounds, 346 U. S. 427; *Markel Electric Products* v. *United Electric R. & M. Workers*, 202 F. 2d 435, 437, 19 LA 849 (C.A. 2); cf. *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 179-180.

[ARBITRABILITY]

3. We think the broad arbitration clause in the collective bargaining agreement here involved covers a dispute relating to an alleged breach of the no-strike clause. Under the agreement, "all disputes, grievances or differences" are arbitrable. We can hardly imagine more broadly inclusive language. This phraseology distinguishes the instant case from *Markel Electric Products* v. *United Electric, E. & R. Workers*, *supra*. To the extent that the other cases cited by plaintiff require a contrary result, we think them erroneous.[3] We think their interpretations of similar arbitration clauses are unduly restrictive and achieve,

[3] *United Electric R. & M. Workers* v. *Miller Metal Products*, 215 F. 2d 221, 23 LA 18 (C.A. 4); *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33, 35, 10 LA 822 (C.A. 4); *Square D Co.* v. *United Electric R. & M. Workers*, 123 F. Supp. 776, 34 LRRM 2627.

by indirection, the same result as the old, and now generally rejected, judicial aversion to enforcing arbitration agreements. Cf. *Kulukundis Shipping Co.* v. *Amtorg Trading Co.*, 126 F. 2d 978, 983-85 (C.A. 2). Other cases, with which we agree, support our decision that the instant arbitration agreement covers a dispute arising from an alleged breach of the no-strike clause. See, e.g., *Lewittes & Sons* v. *United Furniture Workers of America, CIO*, 95 F. Supp. 851, 853-54, 27 LRRM 2490 (S.D.N.Y.); *Penn. Greyhound Lines* v. *Amalgamated Ass'n*, 98 F. Supp. 789, 791, reversed on other grounds, 193 F 2d 327, 17 LA 688 (C.A. 3); *Hudson Wholesale Grocery Co.* v. *Allied Trades Comm.*, 65 A. 2d 557, 559, 12 LA 736 (N.J. Ch.).

The plaintiff itself apparently construed the grievance-arbitration provision to include this dispute, since it instituted a grievance pursuant to the provisions of Paragraph 18 of the agreement with respect to "the matter of the quitting of employment by the members of the union, with the knowledge, consent and direction of the union."

[ARBITRATION ACT]

4. There remains the question whether the Union is entitled to a stay of the action pending arbitration under Section 3 of the United States Arbitration Act or under Section 301 of the Taft-Hartley Act. Since we decide that Section 3 of the Arbitration Act is applicable to this agreement and authorizes a stay of the proceedings, we do not reach, and need not decide, whether the arbitration agreement is enforceable under Section 301 of the Taft-Hartley Act, as some courts have held.[4]

The Supreme Court, in strong dictum, has recently stated that Section 3 of the Arbitration Act is limited

[4] See, e.g., *Textile Workers Union* v. *American Thread*, 113 F. Supp. 137, 32 LRRM 2205 (D. Mass.); *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. 163, 165, 23 LA 824 (S.D. N.Y.); *The Evening Star Newspaper Co.* v. *Columbia Typo. Union*, 124 F. Supp. 322, 323, 23 LA 262 (D.C. D.C.); *Local 207, Etc.* v. *Landers, Frary & Clark*, 119 F. Supp. 877, 879, 22 LA 489 (D.C. Conn.); *conpra, Lincoln Mills of Ala.* v. *Textile Workers Union*, 230 F. 2d 81, 87-88, 25 LA 810 (C.A. 5); *United Electric, R. & M. Workers* v. *General Electric Corp.*, 38 L.R.R.M. 2019, 2027 (C.A. 1).

by Sections 1 and 2; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 201-202, 25 LA 693. We think the collective bargaining agreement in this case is a "contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Act.[5] We also think that the last clause in Section 1 of the Act, which excludes certain contracts from the Act, is not applicable to this agreement. That clause provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

The Supreme Court has not yet interpreted the exclusionary clause in Section 1, and the decisions of the lower federal courts are in irreconcilable conflict. The decisions of the various circuits are discussed and reviewed in *Lincoln Mills of Alabama* v. *Textile Workers Union 230*, F. 2d 81, 85-86, 25 LA 810 (C.A. 5) and in *United Electric, R. & M. Workers* v. *General Electric*, 38 LRRM 2019, 2029 (C.A. 1). We will not repeat their labor here. Suffice it to say that the First, Fourth, and perhaps the Tenth Circuits would hold that the instant agreement comes within the exclusionary clause in Section 1 and, hence, that the Arbitration Act is inapplicable. The Third, Fifth and Sixth Circuits would hold that the agreement does not come within the exclusionary language of Section 1, and that therefore Section 3 of the Act, authorizing a stay of the action, is applicable. Those cases which so hold do so either on the ground that a collective bargaining agreement is not a "contract of employment," within the meaning of that language in Section 1,[6] or—as the Third Circuit has held in *Tenney Engineering, Inc.* v. *United Electric, R. & M. Workers*, 207 F. 2d 450, 452-53, 21 LA 260 (C.A. 3)—because, even assuming a collective bargain-

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[5] See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 200-201, 25 LA 693; *United Electric R. & M. Workers* v. *General Electric Corp.*, 38 L.R.R.M. 2019, 2027-28 (C.A. 1); Sturges & Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law and Contem. Probs. 580, 617-19 (1952); Cox, Grievance Arbitration in the Federal Courts, 67 Harv. L. Rev. 591, 598-599 (1954).

[6] The cases which so hold rely primarily on languages in *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332, 334-36, 14 LRRM 501, a case not involving an interpretation of the Arbitration Act at all.

ing agreement is a "contract of employment"—the exclusionary clause in Section 1 applies only to "workers engaged in * * * interstate commerce," i.e., only those actually in the transportation industries.

[LEGISLATIVE HISTORY]

The legislative history of the exclusionary clause in Section 1 is, at best, vague and inconclusive. The language apparently was inserted at the request of the Seamen's Union, which felt that disputes involving the contracts of seamen came within the admiralty jurisdiction and should not be subject to arbitration. It is likely that the Union was concerned, at least in part, with its own collective bargaining agreements. Thus, to hold that such agreements are not "contracts of employment," and hence not within the exclusionary language in Section 1, would tend to defeat what little congressional intent can be discerned concerning that language. We incline to agree with the decision and reasoning of the Third Circuit in the *Tenney* case. This conclusion is consonant with our decisions. Although this court has never passed on the precise issue here involved, we did, in *Shirley-Herman Co.* v. *International Hod Carriers,* 182 F. 2d 806, 809, 26 LRRM 2258 (C.A. 2), impliedly hold that a collective bargaining agreement constituted a "contract of employment"; and in *Bernhardt* v. *Polygraphic Co. of America,* 218 F. 2d 948, 951-52, 23 LA 821 (C.A. 2), reversed on other grounds, 350 U. S. 198, 25 LA 693, we gave a restrictive interpretation to the term, "workers" as used in the exclusionary clause in Section 1.

In view of the present, almost universal, approval of arbitration as a means for settling labor disputes,[7]

[7] *United Office and Professional Workers, CIO* v. *Monumental Life Ins. Co.,* 88 F. Supp. 602, 607, 13 LA 1007 (E.D. Pa.); *Market Electric Products* v. *United Electric R. & M. Workers,* 202 F. 2d 435, 438, 19 LA 849 (C.A. 2) (dissenting opinion by Judge Clark); Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 274, 305 (1948); Gregory, The Collective Bargaining Agreement; Its Nature and Scope, 1 Labor, L.J. 451, 456 (1950); Kaye and Allen, Union Responsibility and Enforcement of Collective Bargaining Agreements, 30 Boston U.L. Rev. 1, 22-30 (1950); Warren and Bernstein, A Profile of Labor Arbitration, 4 Indus. and Labor Rel. Rev., 200, 202 (1950).

including the express approval of Congress,[8] we think the courts should interpret the United States Arbitration Act so as to further, rather than impede, arbitration in this area. We think the interpretation of the Third Circuit in *Tenney* accords both with the modern trend and with what we deem to be the intention of Congress.

The plaintiff's employees are not "engaged in • • • commerce," that is, they are not actually engaged in interstate and foreign commerce. They are merely engaged in the manufacture of goods for interstate commerce. Therefore, the collective bargaining agreement here does not come within the exclusionary clause of Section 1.

The decision of the district court is reversed and the cause is remanded for proceedings in conformity with this opinion.

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[8] Labor Management Relations Act of 1947, Sections 201(c) and 203(d), 29 U.S.C., Sections 171(c), 173(d).